FILED
OCT 17 1921
WM. R. STANSBURY
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 138

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

v.

SMITH, BELL & COMPANY, LIMITED, *Respondent*.

No. 140

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

v.

COMPANIA GENERAL DE TABACOS DE FILIPINAS, *Respondent*.

No. 142

JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR THE PHILIPPINE ISLANDS, *Petitioner*,

v.

VISAYAN REFINING COMPANY, *Respondent*.

PETITIONER'S REPLY BRIEF

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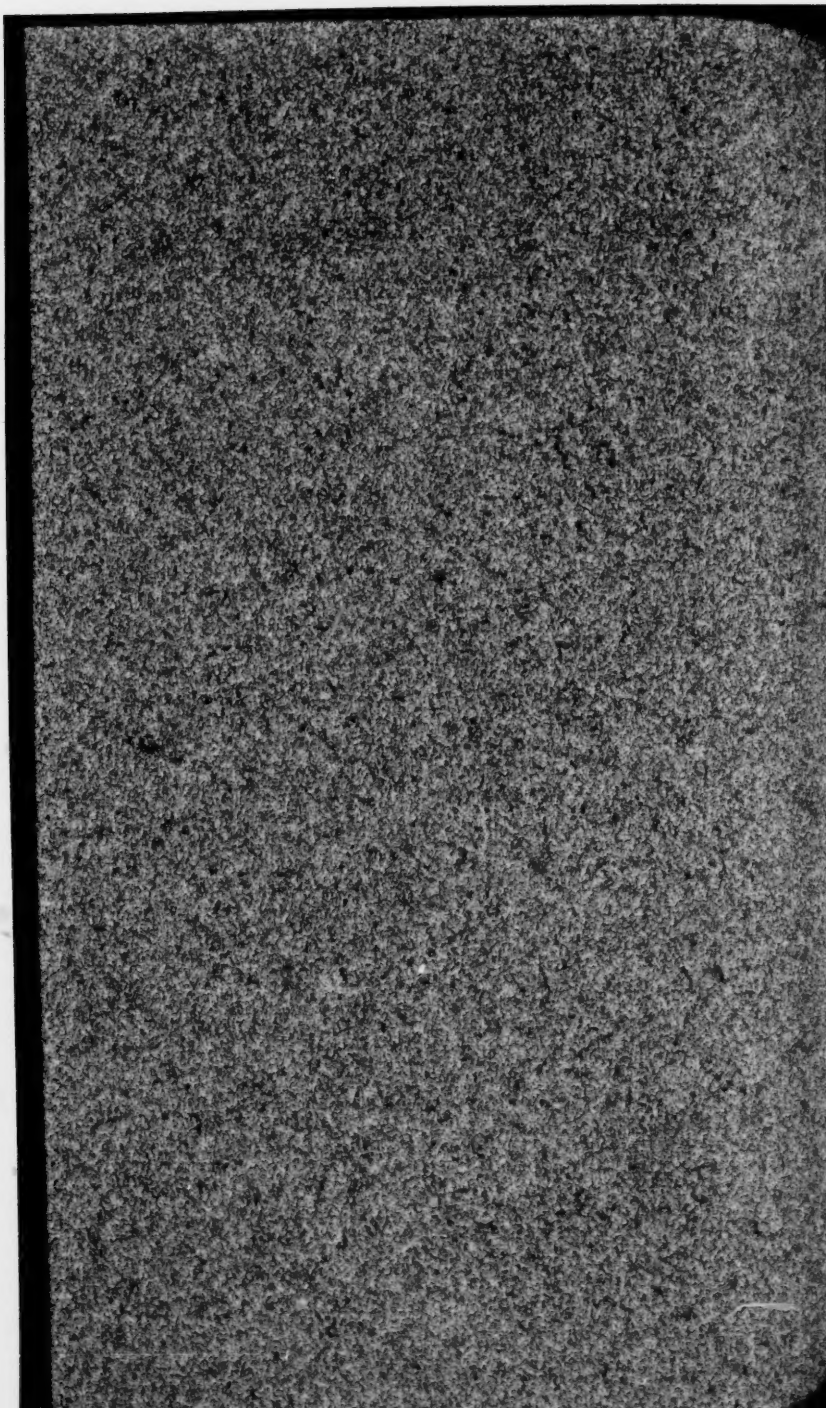

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PETITIONER'S REPLY BRIEF

THE THEORY UPON WHICH THE CASES WERE INSTITUED AND TRIED.

The only justification for the presentation of this reply brief is the fact that respondents have declined to accept our suggestion that:

> "As these actions were commenced and prosecuted against the Collector of Internal Revenue for the Philippine Islands and not against the person who held or who is now holding that position in his individual or private capacity, it is agreed by counsel for all the parties that the substitution of the name of the present Collector of Internal Revenue for that of James J. Rafferty may be considered as having been duly made."

Upon this question counsel, in Case No. 138, says:

> "This action was commenced and prosecuted against James J. Rafferty in his personal capacity —not against the Philippine Government nor against its Collector of Internal Revenue as such. Therefore, respondent has not agreed, and does not agree, to the substitution suggested by petitioner in the first paragraph of his brief."

Again, counsel says that "In this case the suit is against James J. Rafferty, an individual. It involves only the liability of the Collector" (page 14). "The Philippine Legislature could not relieve the petitioner of his personal obligation to make good the damage resulting from his unauthorized acts" (page 29). "If, however, it (Section 1579 of Act No. 2711), is so construed as to govern an action to enforce the personal obligation of the petitioner, * * *, Section 1579 contravenes the Autonomy Act" (page 30). "That this action is against

James J. Rafferty personally under the Civil Code, and not against the Collector of Internal Revenue in his official capacity under the authority of the Administrative Code, appears from the pleadings and from the decisions of the Philippine Courts" (page 34, 35). "That the indirect interest of the Philippine Government arising from its undertaking to pay the judgment herein is not a sufficient reason for an exception to the general rule, appears from the terms of Section 1583 of Act 2711 (and its prototype in preceding codes), which specifically authorizes the payment of costs awarded in suits against internal revenue officers" (page 40). "The judgment is against an individual and not a government" (page 43).

Turning now to the brief in cases Nos. 140 and 142, we find counsel saying and urging that:

> "This action was commenced and prosecuted under the Philippine Code of 1916. Section 1721 provides for the action, and in case of judgment, Section 1725 provides for its payment by the Collector of Internal Revenue. Under the circumstances, James J. Rafferty, defendant below, petitioner here, should be continued. Therefore, respondents cannot and do not consent to the substitution proposed by petitioner on p. 1 of his brief."

Again, he says, "If, however, it (Section 1579 of Act No. 2711) is so construed as to apply to an action to recover sums exacted under the authority of a former law, superseded by Act 2711, which authorized recovery with interest, Section 1579 contravenes the Autonomy Act" (page 37). "These cases are governed by Section 1721 of Act 2657, the Administrative Code of 1916, in force when the taxes were collected and when the suits were brought, * * *" (page 39)." *These actions are brought*

against the Collector of Internal Revenue in his official capacity (Italics ours). If, as contended by petitioner, they are substantially against the Philippine Government, nevertheless interest should be paid" (page 42). "The cause of action arose and was begun under a law permitting interest" (page 47).

Sections 1721 and 1725 of Act No. 2657 were in force when the taxes were collected and when the suits were brought in cases Nos. 140 and 142 and when the taxes were collected in Case No. 138. Section 1721 was amended by Section 1579 of Act No. 2711, effective October 1, 1917, by inserting the words "without interest." This section as thus amended was in force at the time Case No. 138 was instituted. Act No. 2711 only changed the number of Section 1725 without amending it.

For the purpose of making clear the theory upon which the cases were instituted and tried, let us assume that there is a marked difference, both in the cause of action and the results flowing therefrom, in suits brought under Section 1721 of Act No. 2657 or Section 1579 of Act No. 2711 and those brought under the Civil Code, the judgments in which may be paid by the Collector of Internal Revenue in accordance with Section 1725 of Act No. 2657 or Section 1583 of Act No. 2711; or in other words, let us say that the former are in law and in fact suits against the Philippine Government, the Collector being only a nominal party, while the latter are suits against the revenue officer in his personal capacity. We will attempt to show under the next subheading that this is legally true.

It is quite clear that Sections 1721 of Act 2657 and Section 1579 of Act 2711 are only applicable in cases wherein (a) the validity of any tax is questioned; or (b) wherein the amount of the tax is disputed; or (c) wherein other questions are raised as to liability therefor. It is

likewise clear that in order to maintain a suit under either section the taxpayer must show (1) that he paid the tax under protest; (2) that he requested the decision of the Collector thereon; (3) that the decision of the Collector was either adverse to his contention or delayed for six months; and (4) that he brought his action within two years after payment of the tax.

An examination of the printed records will show that in each case the validity of the tax was questioned; that the tax was paid under protest; that the decision of the Collector was adverse as shown by his refusal to return the amount; and that the suit was brought within the statutory period. The complaints in each case are essentially the same and the decisions of the lower courts rest upon the same legal principles. The two main questions were raised in each case; viz., was the tax a duty on exports? Was the tax ratified by Congress? The three dissenting justices as to costs in Case No. 138 took it for granted that the suit was against the Philippine Government. Before the institution of these proceedings we cannot find where any one even questioned the fact, if it be a fact, that these cases were instituted and tried under the above-mentioned section of the Administrative Code providing for the recovery of taxes illegally assessed or collected and which were paid under protest. We are, therefore, unable to follow counsel in his reasoning wherein he attempts to show that Case No. 138 is a suit against the petitioner, James J. Rafferty, personally, and that the Philippine Government obligated itself by the enactment of Section 1583 of Act No. 2711 to pay the judgment, together with interest and costs, while at the same time insisting that cases Nos. 140 and 142 are governed by Section 1721 of Act No. 2657.

The Scope and Meaning of Sections 1579 and 1583 of Act No. 2711, Being Sections 1721 and 1725 of Act No. 2657.

Sections 1579 and 1583 of Act No. 2711, being Sections 1721 and 1725 of Act No. 2657 with the addition of the term "without interest" in Section 1579, read as follows:

> "Sec. 1579. *Recovery of tax paid under protest.* When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property, the same is sought to be enforced, shall pay the tax under instant protest, or upon protest within ten days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after payment of the tax, to bring an action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."
>
> "Sec. 1583. *Satisfaction of judgment recovered against treasurer or other officer.* When an action is brought against any revenue officer to recover damages by reason of any act done in the performance of official duty, and the Collector of Internal Revenue is notified of such action in time to make defense against same, through the Attorney-General, any judgment, damages or costs recovered in such action shall be satisfied by the Collector of Internal Revenue upon approval of the Department head, or if the sum be paid by the person sued, shall be repaid or reimbursed to him.

"No such judgment, damages, or costs shall be paid or reimbursed in behalf of a person who has acted negligently or in bad faith, or with wilful oppression."

These sections appear under the article in the Administrative Code entitled "Remedies in general." Section 1578 (formerly Section 1720), which provides that "no court shall have authority to grant an injunction to restrain the collection of any internal-revenue tax" is in the same article. Section 1578 is not in conflict with the Organic Laws. *Churchill* v. *Rafferty*, 32 Phil. Rep. 593.

Counsel, at pages 32 and 33 of his brief in Case No. 138, lays down these propositions:

"(1) The aggrieved taxpayer has a special action, substantially against the Government, under the authority of Section 1579 of Act 2711, or the corresponding sections of preceding codes; and he has his action against the collector personally upon the quasi-contractual obligation arising from the receipt of what is not due, defined in Articles 1895-1901 of the Civil Code.

"(2) But the establishment of this special remedy has not precluded the taxpayer's right to sue personally the officer who exacted the undue payment, whether the chief of the bureau or another. As the United States Revised Statutes, Section 989, recognizes the personal liability of collectors and provides for their protection against personal judgments, so Section 1583 of Act 2711 makes similar provisions for the case of personal judgments recovered against Philippine collectors."

We agree that the aggrieved taxpayer has his right of action against the Collector as the nominal party and against the Philippine Government as the real party in interest under Section 1579 to recover any tax paid under

protest wherein the validity of such a tax is questioned, or its amount is disputed or other questions raised as to the liability therefor. And we go further and urge as a sound legal proposition that that right of action or remedy is absolutely exclusive of all other remedies available to the taxpayer for the recovery of such taxes which can result in placing the Philippine Government under any obligation to refund the taxes so paid. Or in other words, the only remedy which the respondents have to recover back from the Philippine Government the taxes in question is that provided for in Section 1579 of Act 2711, formerly Section 1721 of Act 2657. By the enactment of these sections, the government waived its immunity and permits itself to be sued under the limitations stated therein. Unless it affirmatively appears that the validity of the tax is questioned, or its amount is disputed or some other question is raised as to the liability therefor; that the tax was paid under protest; and that the Collector was given an opportunity to pass upon the complaint, the dissatisfied taxpayer cannot hope for recovery. These are the stated conditions and they must be complied with.

The duty of determining the validity of a tax, which can only be done by passing upon the constitutionality of the statute under which the tax is levied and collected, is essentially a judicial function and whether the duty of determining the proper amount to be paid and all questions touching the liability of the particular person therefor is likewise essentially a judicial function and of no importance, because such has been expressly made so by Section 1579, *supra*.

Section 989 of the Revised Statutes of the United States, cited and relied upon by counsel for respondents to support the proposition that the Philippine Government is obligated to pay judgments in suits brought under Sec-

tion 1583, *supra,* for the return of taxes paid under protest, reads as follows:

> "When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector, or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the appropriation from the Treasury."

That the subject matters covered by Sections 1579 and 1583, *supra,* of the Philippine Statute are covered by R. S. 989 clearly appears from the language of the latter. If the cause of action is for the recovery of any money exacted by or paid to the collector or other officer of the revenue and by him paid into the Treasury, in the performance of his official duty, the court *must* grant a certificate of probable cause; but in the other class of cases, it is within the sound discretion of the court whether or not the certificate should be granted. To this extent and in this manner only, R. S. 989 and the cases cited are applicable to the questions raised upon this branch of the cases.

There is no relation between Section 1579 and 1583. They are entirely disassociated. They create two distinct remedies, dealing with separate and distinct subjects. The first relates exclusively to actions for the recovery of taxes paid under protest. The second, Section 1583, relates to official wrong-doing generally. The

Government assumes no obligation under Section 1583 if it be shown that the officer "acted negligently or in bad faith, or with willful oppression."

While it is true that the collection in good faith of a sum of money as a tax under a void statute, or an excess amount, or from one who does not owe it, under color of authority, will damage the person who is forced to pay the same, yet such damages do not come within the scope of the term "to recover damages by reason of any act done in the performance of official duty" found in section 1583, *supra*. This section includes only judgments, damages, or costs in actions against revenue officers for acts done in the execution of the Internal Revenue Law which may form the basis for actions under the Civil Code. The examination of Chapter 40 of Act No. 2711, which amended the Administrative Code in certain particulars, will disclose that the powers and duties of the Bureau of Internal Revenue are very broad and comprehensive (Section 1423); that the Collector and other revenue officers are authorized to make arrests and seizures for the violation of any penal law or regulation administered by the Bureau of Internal Revenue (Section 1434); that they are authorized to administer oaths and to take testimony (Section 1436); that the Collector is authorized to remove any sign, sign board, or billboard if it "*is offensive to the sight* or is otherwise a nuisance" (Section 1477); that revenue officers are empowered to destroy defective instruments of weights and measures (Section 1531); that they may enter any house, building, or place where articles subject to tax are produced or kept (Section 1571); that they may detain any package containing or supposed to contain articles subject to a specific tax (Section 1572); that they may seize, sell or destroy specific personal forfeited property (Section 1585); that they

may seize and sell personal property for the payment of delinquent taxes (Section 1590). There are many other powers and duties conferred upon revenue officers. It is the judgments, damages, or costs resulting from the performance of these and kindred official duties which the government authorizes in Section 1583, *supra*, the Collector to pay "upon approval of the Department head." The words "upon approval of the Department head" confers a discretionary power upon that official and he may approve or withhold approval of the judgment, *or* damages *or* costs as he may see fit. He may approve the one and disapprove the other. The main purpose of Section 1583 is to protect the revenue officers from financial loss resulting from the performance of official duties in good faith and not to protect the injured citizen as he has his remedy against the officer personally.

PROPOSED SUBSTITUTION AUTHORIZED.

The substitution of the present Collector of Internal Revenue as suggested in our brief is authorized by Section 110 of the Philippine Code of Civil Procedure provided that it be held that the Collector is only a nominal party. If we had any doubt as to the final disposition of these cases by this court, we would not question the contention of counsel that the substitution should not be made for the reasons stated by him, because if the cases are disposed of upon that theory neither the Philippine Government nor James J. Rafferty will be injured thereby. The Philippine Government is under no obligation to pay any judgment, damages, or costs, under Section 1583, *supra*, in cases wherein aggrieved taxpayers are suing to recover taxes paid under protest. A Collector of Internal Revenue will not be held personally liable for the collection of an *excise* tax under color of authority where it ap-

pears, as in the instant cases, that he acted in good faith and that the aggrieved taxpayer has a plain and adequate remedy against the Government by its consent.

We respectfully suggest that our proposal to substitute may now be considered as a pending motion and disposed of accordingly.

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